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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WILLIAM F. DOHR, as Trustee, etc.,

Plaintiff and Respondent,

v.

LOIS LYNNE LINTZ,

Defendant and Appellant.

G046091

(Super. Ct. No. 30-2010-00335588)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sharah A. Reid, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Everett L. Skillman for Defendant and Appellant.

Thomas Vogeles & Associates, Thomas A. Vogeles and Timothy M. Kowal for Plaintiff and Respondent.

\* \* \*

Defendant Lois Lynne Lintz appeals from an order granting a motion for attorney fees. Plaintiff William F. Dohr, trustee of the Mackenzie Sayre Lintz Trust (trust), incurred the fees prosecuting a petition for instructions concerning the trust's responsibility to pay the beneficiary's living expenses. The written order granting the motion states the court based the award on "§§ 11003 and/or 17211 . . . ." The order is appealable. (Prob. Code, §§ 1300, subd. (e), 1304, subd. (a); all further statutory references are to the Probate Code unless otherwise indicated.)

Defendant contends the fee award is both legally and factually erroneous and the probate court also erred by imposing it on her individually. We conclude she is correct in asserting there is no statutory basis for the fee award and therefore reverse the order.

## FACTS AND PROCEDURAL BACKGROUND

Robert H. Lintz and Joann E. Lintz created the trust in October 1993 for their then nearly two-year-old daughter Mackensie Lintz. (The trust instrument contains an erroneous spelling of the beneficiary's first name.) Plaintiff was appointed trustee.

Initially, the trust corpus consisted of a residence located in Marin County. Over time the trust's corpus was supplemented with investments in long-term real estate ventures.

The trust provided that, subject to certain conditions not relevant here, Joann Lintz could occupy the residence with her daughter until the latter turned 19. In addition, it declared "[t]he Trustee shall pay the entire net income of the Trust to or for the benefit of Macknezie Sayre Lintz, commencing at age eighteen (18), and continuing during her lifetime . . . , and shall further pay to Mackenzie Sayre Lintz so much of the principal thereof . . . as the Trustee in its sole discretion determines."

The same day Robert and Joann Lintz created the trust, they also signed a property settlement and child custody agreement. This document acknowledged Joann Lintz's "right to occupy" the trust home and further stated Robert Lintz "shall pay all taxes and maintenance associated with said occupancy." One section covering custody, visitation, and support, contained a paragraph declaring that, in addition to paying child support, Robert Lintz "shall . . . be responsible for all of the reasonable clothing, medical, dental, and educational expenses, including college or trade school, of the child."

Shortly after signing both the trust and agreement, Robert and Joann Lintz filed a joint petition for divorce in Nevada. The Nevada court issued a divorce decree acknowledging Robert Lintz had "agreed to pay . . . all . . . reasonable clothing, medical, dental, and educational expenses . . . of the child" and "fully funded the purchase of a residence in the name of the child's trust and agreed to be responsible for all costs associated therewith."

According to plaintiff's brief, after the divorce Robert Lintz moved twice, once to Newport Beach and later to Pebble Beach. Each time, he sold the prior trust home and purchased a new residence for Mackensie Lintz and his ex-wife. At least until 2007, he also paid all costs of maintaining the trust home and for Mackensie Lintz's living expenses, including educational and medical costs. Joann Lintz lived in the trust home until her death in August 2009.

Robert Lintz eventually married defendant. Plaintiff's petition for instructions alleged that, in 2007 defendant began demanding plaintiff use the trust assets to pay Mackensie Lintz's expenses for a private school she attended. After a meeting held in June, plaintiff, defendant, and Robert Lintz signed what is entitled a "Non-Binding Agreement Between Two Long Time Friends . . . ." (Use of bold lettering and some capitalization omitted.) In part, the document states: "It is agreed that [plaintiff] should remain as Trustee of the Mackenzie Sayre Lintz Trust. . . . Future annual reports

including [b]alance sheet, [p]rofit [s]tatement, and [l]ist of [a]ssets should be mailed to [Robert Lintz] and [defendant]. Any *requests* . . . for educational expenses should be made well in advance of the need so [plaintiff] can prepare the trust to have adequate cash on hand to meet those costs. . . .”

Robert Lintz died in October 2009. Many years earlier he had created another trust that held all of his property acquired before he married defendant. Mackensie Lintz is one of the named beneficiaries of this trust. Upon Robert Lintz’s death, defendant became the sole trustee of this trust. Litigation over it was filed in Monterey County. In June 2011, that court issued a ruling removing defendant as trustee.

Plaintiff’s January 2010 petition for instructions alleged that after Robert Lintz died, defendant’s attorney began to send plaintiff’s attorney invoices for both Mackensie Lintz’s school tuition and medical insurance premiums. It asserted that in November 2009, plaintiff learned her medical insurance had been cancelled for nonpayment. Relying on a trust provision allowing him “to borrow money from himself ‘for any and all purposes,’” plaintiff used his personal funds to reinstate the medical insurance policy and keep it in force. Plaintiff also alleged he spent personal funds to pay the trust home’s taxes and maintenance and to make repairs so that it could be sold and the proceeds invested for Mackensie Lintz’s benefit.

The petition for instructions was filed under section 17200, subdivision (b)(6). It allows a trustee to petition the probate court “concerning the internal affairs of the trust,” which includes “[i]nstructing the trustee.” Plaintiff’s petition sought answers to the following questions: 1) “whether [the trust] is obligated to pay all current and future property taxes, maintenance expenses and refurbishment costs for the [t]rust [h]ouse”; and 2) “whether [the trust] is obligated to pay Mackensie[ Lintz’s] living expenses and support, including . . . reasonable clothing expenses, medical insurance premiums and medical and dental expenses . . . .”

Mackensie Lintz initially opposed the petition and also filed two of her own seeking an accounting and to remove plaintiff as trustee. Defendant joined only in the opposition to plaintiff's request for instructions, identifying herself as "the surviving [t]rustee of the Lintz Family Trust" and "the third party most affected by [plaintiff's p]etition."

Before the matters could be heard, plaintiff and Mackensie Lintz filed a stipulation to withdraw her opposition to plaintiff's petition, plus her own two petitions. The written stipulation recited that plaintiff, Mackensie Lintz, and their attorneys had "met . . . and reached a tentative agreement to resolve the issues raised by Mackensie[ Lintz's] two petitions" and plaintiff submitted accountings covering the period from January 1998 through the end of 2010. At a second meeting, these parties further "agreed that Mackenzie[ Lintz's o]pposition to [plaintiff's p]etition should be withdrawn . . . ."

The probate court rejected plaintiff's opposition to defendant's joinder in challenging his petition for instructions and conducted an evidentiary hearing on this pleading. It ruled the trust was not obligated to pay the expenses for either the trust home or any of Mackensie Lintz's living expenses. In its statement of decision, the court found "Robert [Lintz] clearly made an express and specific agreement in the [c]ustody [a]greement to pay Mackensie[ Lintz's] educational expenses, medical expenses, and support. Even absent this agreement, there is no language in the [trust] obligating the [t]rust to pay these expenses." As for the June 2007 document, the court described it as "It is what it is, non-binding." It deemed plaintiff "the prevailing party" and issued a judgment declaring he "may file a motion seeking an award of attorneys' fees and costs . . . ."

Plaintiff filed a memorandum of costs and a motion for attorney fees, citing sections 2622.5, 11003, and 17211 as grounds for the latter request. The motion sought

attorney fees “related to filing the [p]etition, successfully defending against [defendant’s] petition to remove [him] as trustee and petition for instructions, taking . . . depositions, appearing at motion and calendar hearings, attending mandatory settlement conference, preparing for and conducting trial, preparing orders and notices.”

The fee motion was supported by a declaration from Mackensie Lintz. In it she asserted defendant told her plaintiff was improperly administering her trust and “if the [p]etition was granted, I would suffer detriment.” At the urging of defendant and her lawyer, she retained an attorney selected by defendant for whom the latter paid the retainer fee. But after meeting with plaintiff and reviewing materials he provided to her, she “came to believe [plaintiff] had not done any of the things [defendant and her attorney] told me he had done and, in fact, he had acted in my best interest in all transactions affecting my [t]rust.” Lintz’s declaration further claimed “[h]ad [defendant and her attorney] not made what I later learned were incorrect statements to me about [plaintiff] and his management of my [t]rust, I never would have opposed the [p]etition or filed a petition to remove the [t]rustee and for an accounting.”

Defendant opposed both the costs memorandum and the fee motion. The parties stipulated to have the matter heard by a temporary judge instead of the judge who presided over the hearing on the petition for instructions. The court awarded plaintiff a reduced amount of his claimed costs and \$87,000 in attorney fees.

## DISCUSSION

Defendant challenges the court’s attorney fee award on three grounds. First, she claims there is no statutory authority for the award. She notes sections 2622.5 and 11003 do not apply to trust proceedings, while section 17211’s coverage is limited to accounts, not a petition for instructions. Second, she argues the evidence fails to support

a finding her opposition to plaintiff's petition for instructions lacked reasonable cause or was made in bad faith. Finally, defendant contends the probate court erred by imposing the fees against her in her individual capacity, rather than against her as trustee of the Lintz family trust. Plaintiff disputes each of these claims. However, since we conclude defendant's first contention has merit, we need not consider the latter two arguments.

Code of Civil Procedure section 1021 declares, "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement . . . of the parties . . . ." This statute constitutes a codification of the American rule (*Soria v. Soria* (2010) 185 Cal.App.4th 780, 785), and it applies in probate proceedings (*Estate of Beach* (1975) 15 Cal.3d 623, 646; *Estate of Gerber* (1977) 73 Cal.App.3d 96, 117; *Estate of Myers* (1964) 230 Cal.App.2d 465, 467). Thus, "[t]here is no general rule which permits the recovery of attorney's fees by a successful litigant. Compensation for the services of an attorney must ordinarily be paid by the client employing him, in the absence of exceptional circumstances . . . ." (*Estate of Marre* (1941) 18 Cal.2d 191, 192.)

While a posttrial review of an attorney fees award is generally reviewed for abuse of discretion, "'de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees . . . have been satisfied amounts to statutory construction and a question of law.'" (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) In this case, plaintiff's statutory right to recover attorney fees is subject to our independent review. (*Soria v. Soria, supra*, 185 Cal.App.4th at p. 786 [applying de novo review in deciding the applicability of section 17211].)

Sections 2622.5, 11003, and 17211 authorize recovery of attorney fees where a party contests or opposes a proceeding "without reasonable cause and in bad faith . . . ." (§§ 2622.5, 11003, & 17211.) However, defendant is correct in arguing

sections 2622.5 and 11003 are inapplicable. The former involves guardianships and conservatorships (§ 2622.5), while the latter concerns the settlement of an account in the administration of a decedent's estate (§ 11003). This case concerns a trust.

Section 17211 does apply to trust proceedings. Subdivision (a) states, "If a beneficiary contests the trustee's account and the court determines that the contest was without reasonable cause and in bad faith, the court may award against the contestant the compensation and costs of the trustee and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. The amount awarded shall be a charge against any interest of the beneficiary in the trust. The contestant shall be personally liable for any amount that remains unsatisfied." Subdivision (b) is similar except that it applies when a trustee unreasonably and for an improper purpose opposes a beneficiary's contest to "the trustee's account." Since this case involves a trustee's attorney fee request against a person standing in the shoes of the beneficiary who contested a petition filed by the trustee, it concerns the applicability of section 17211, subdivision (a).

Defendant claims the court erred in relying on section 17211 to justify the fee award. She argues "[t]he plain language of the statute shows that it only applies to . . . fees 'incurred to defend the account' when someone 'contests the trustee's account,'" and here plaintiff "did not issue an accounting." Plaintiff disagrees, claiming section 17211 has been construed to "broadly appl[y] to petitions 'concerning the internal affairs of . . . trust[s].'" He argues his "petition sought instructions from the probate court regarding the internal affairs of the . . . [t]rust," and further contends since "no account could be provided until the [petition's] questions were settled," his "'duty to account was inseparable from his duty to carry out the terms of the [t]rust.'"

The record belies plaintiff's argument. He brought this proceeding by filing a petition for instructions concerning the trust's obligation to pay the maintenance costs of the trust home and the beneficiary's living expenses. The petition's supporting



documentation did not include an account of the trust's assets. Mackensie Lintz, the trust's beneficiary, initially sought an accounting. But that matter was mutually resolved without a hearing. Defendant joined only in Mackensie Lintz's opposition to plaintiff's petition for instructions, not her separate petition for an accounting. Contrary to plaintiff's brief, the written stipulation acknowledges he provided Mackensie Lintz with an accounting of the trust's assets months before the court conducted a hearing on his petition for instructions.

Plaintiff relies on *Leader v. Cords* (2010) 182 Cal.App.4th 1588. It contradicts rather than supports his argument. In *Leader*, a couple created a family trust providing that, after they both died, the remaining assets were to be equally divided between their two adult children. The husband died and the wife passed away two years later. Terry, the couple's son, became the successor trustee. Shortly thereafter, the couple's daughter died and her share of the estate passed to her two children, Rachel and Adam. Terry distributed some but not all of the estate's assets. Ultimately Rachel and Adam demanded an accounting. Terry eventually complied. His accounting reflected the trust contained a substantial amount of cash and did not have any outstanding debts. Rachel and Adam then petitioned for a final distribution of the trust assets and a determination that Terry breached his trust duties. The probate court granted the petition, but rejected their request for attorney fees under section 17211, finding the matter did not involve “an action on an accounting.” (*Leader v. Cords, supra*, 182 Cal.App.4th at p. 1594.)

The Court of Appeal reversed the portion of the order denying attorney fees. Describing section 17211 as a remedial measure that should be liberally construed, the court held it applied to a “petition . . . ‘relating to an account.’” (*Leader v. Cords, supra*, 182 Cal.App.4th at p. 1598.) “Terry’s duty to account was inseparable from his duty to carry out the terms of the [t]rust by distributing the remaining [t]rust assets, and

Rachel and Adam's petition arose from and was directly related to his account. Terry's account should have, but did not, indicate a forthcoming distribution of remaining [t]rust assets to the beneficiaries. A beneficiary may, of course, contest a trustee's account on the basis of a distribution made from the [t]rust, and in our view a challenge to an omitted distribution equally qualifies as a 'contest[] [of] the trustee's account.' [Citation.]" (*Id.* at pp. 1598-1599, fn. omitted.)

In *Leader*, it was the trustee's accounting that triggered the beneficiaries' petition for a distribution of assets and a ruling on the trustee's handling of the trust. Consequently, their petition related to the trustee's account. That is not the situation here. Plaintiff did not submit an accounting in support of his petition for instructions. As the court noted, plaintiff's petition primarily "involved an interpretation of a trust . . . ." Contrary to plaintiff's assertion, section 17211 does not "broadly appl[y] to petitions 'concerning the internal affairs of the trust.'" *Leader* expressly rejected this conclusion, declaring "our holding does not render section 17211 . . . applicable to every . . . action under section 17200." (*Leader v. Cords, supra*, 182 Cal.App.4th at p. 1599; see also *Soria v. Soria, supra*, 185 Cal.App.4th at p. 789 ["Section 17211 is a remedial statute, but liberal construction can only go so far"].)

Mackensie Lintz did file a petition seeking an accounting and the court made a finding defendant "encouraged or directed" her to do so. But that petition is not relevant here. As noted, defendant never joined in it and Mackensie Lintz withdrew her accounting request by mutual consent without a hearing. Not only does plaintiff fail to mention the stipulation reflected the agreement to withdraw Mackensie Lintz's other petitions partly resulted from his providing her with an accounting, his brief, makes the contradictory assertion "he could not provide an accounting without first confirming whether [the trust] was responsible for Mackensie[ Lintz's] ongoing expenses and for repairing and disposing of the [t]rust [h]ouse."

Consequently, we conclude no statutory basis exists supporting the award of attorney fees in this case.

#### DISPOSITION

The order is reversed. Appellant shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.